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IN THE

Supreme Court of the United States

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, AND UNIVERSITY PHYSICIAN ASSOCIATES OF NEW JERSEY,

Petitioners,

v.

DARA CORRIGAN, Acting Inspector General, United States Department of Health and Human Services,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF ASSOCIATION OF AMERICAN MEDICAL COLLEGES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOSEPH KEYES, JR
ASSOCIATION OF AMERICAN MEDICAL COLLEGES
2450 N Street, NW
Washington, DC 20037
(202) 848-0400

DAVID OVERLOCK STEWART
Counsel of Record
THOMAS M. SUSMAN
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
(202) 508-4600

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Balmar Legal Publishing Services, Falls Church, VA (202) 289-9000

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INTEREST OF THE *AMICUS CURIAE*

The Association of American Medical Colleges (AAMC) respectfully submits this brief *amicus curiae* in support of the Petition for Certiorari in this matter. Pursuant to Supreme Court rule 37.2(a), counsel for the parties have consented to the filing of this amicus brief, and their letters of consent have been filed with the Clerk of the Court.[1]

The decision below, in direct conflict with decisions of two other courts of appeals, approved the performance of routine program audits by the Office of Inspector General of the U.S. Department of Health and Human Services (OIG). That decision undermines the independence of Inspectors General and defeats the principal purpose of the Inspector General Act of 1978.

Founded in 1876, the Association of American Medical Colleges (AAMC) represents 126 accredited medical schools, nearly 400 major teaching hospitals and health systems, more than 105,000 faculty in 98 academic and scientific societies, and the nation's 66,000 medical students and 97,000 residents. Dozens of AAMC member institutions have been subjected to *ultra vires* audits by OIG in its "Physicians at Teaching Hospitals" ("PATH") initiative, which is at issue in this case, and are deeply concerned with the unauthorized expansion of OIG's duties. This Court should affirm OIG's unique role as an independent reviewer of government programs.

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[1] Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Inspector General Act of 1978 was enacted to address one of the intractable questions of public administration: "Who watches the watchers?" The Act's central premise is that government programs should be reviewed by auditors and investigators who are independent and free of conflicts of interest. The explicit goal of the legislation is to create "independent and objective units" of government. 5 U.S.C. app. 3 § 2. To ensure that independence, Congress adopted an organizational structure that sets Inspectors General apart from agency bureaucracies, and specifically barred agencies from transferring "program operating responsibilities" to the new units. *Id.* at § 9(a)(2).

Almost twenty years after the Act was adopted, OIG violated these congressional restrictions when it initiated the PATH audits of physician billing at the nation's teaching hospitals. Without having information that specific physician groups or hospitals had mischarged the Medicare program for teaching physician services, OIG's blanket approach to the PATH audits exceeded the scope of its powers as defined by Congress. In design and in execution, the PATH audits were indistinguishable from routine Medicare billing audits that are performed on a daily basis by 46 Medicare contractors around the country. No matter how praiseworthy OIG's intentions may have been, and no matter how many dollars the PATH audits may have won in settlements, the effort fundamentally defeated Congress' purpose in establishing the Inspectors General.

The decision below also cannot be reconciled with decisions of two other courts of appeals that have enforced the congressional ban on program auditing by Inspectors General. *See Burlington Northern R.R. Co. v. Office of Inspector General,* 983 F.2d 631 (5th Cir. 1993); *Truckers United for Safety v. Mead,* 251 F.3d 183 (D.C. Cir. 2001). The decision below particularly warrants this Court's review because of the massive size of the Medicare and Medicaid programs, and the

dependence of health care providers and their patients on those programs. In that context, the erosion of Inspector General independence approved by the Third Circuit will have a disproportionately large impact.

By its participation in this case, AAMC in no way endorses or excuses overcharging of the Medicare program. The PATH initiative identified billing errors – mostly inadvertent ones caused by decades of confusing government pronouncements. In so doing, however, the OIG sacrificed the independence and objectivity that are the principal reasons for its existence.

ARGUMENT

I. Inspector General Independence Was An Essential Purpose of the 1978 Act

The Inspector General Act was born of a deep congressional frustration with the lack of independence of federal auditors. The House Report on the legislation recited a catalogue of government audits that had been hamstrung by self-protective superiors (124 CONG. REC. 10402 (Apr. 18, 1978)):

> [I]nvestigators in some agencies are not permitted to initiate investigations without clearance from officials responsible for the programs involved. [One official] testified that he had been denied clearance to investigate allegations of wrongdoing on several occasions: in one of these cases, according to his testimony, a later investigation by another law enforcement agency resulted in 22 indictments.
>
> [He] also testified that he had been ordered to discontinue one investigation which had already been initiated: the subject of that investigation, who was suspected of embezzling $10,000, subsequently became a fugitive.

> A supervisory investigator for the Small Business Administration testified that an office inspection program which might have resulted in earlier detection of irregularities in SBA's Richmond office had been terminated some years ago.

As the Office of Legal Counsel of the Justice Department observed in a 1989 interpretation of the statute, Congress found that "existing audit and investigative units were inadequate to deal with this problem [of waste, fraud and abuse] because they reported to, and were supervised by, the officials whose programs they were to audit and investigate." 13 U.S. OP. OFF. LEGAL COUNSEL 54, 58 (1989) ("OLC Opinion"). What was needed, Congress concluded, was a corps of agency auditors and investigators who were independent of narrow bureaucratic agendas. *See* S. REP. NO. 195-1071, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2682.

Congress sought to ensure that independence by imposing several structural protections on the fourteen cabinet-level departments covered by the Act, plus seventeen other federal agencies authorized to have Inspectors General. *See* 5 U.S.C. app. 3 § 11(2). Each of those thirty-one Inspectors General is appointed by the President, with the advice and consent of the Senate. *Only* the President may remove an Inspector General from office, and he must provide to Congress a formal explanation for such a removal, a unique procedure in the entire federal government. 5 U.S.C. app. 3 § 3(a).

The Inspector General is responsible *only* to the head of her agency, not to any intermediate official. *Id.* No one - not even the head of the agency - has the power to restrict any investigation or audit initiated by the Inspector General. *Id.* Moreover, the Inspector General may submit reports directly to Congress without approval by the head of her agency, whose sole right is to review and comment on that report. *Id.*

at § 5(a), (b). *See generally* Dan W. Reicher, Note, *Conflicts of Interest In Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975, 984-85 (1983).

Even with these structural protections, Congress feared that Inspector General independence could be compromised if the agency were able to gain control of the Inspector General's agenda, or if - as occurred in this case - the OIG assumed duties Congress specifically delegated to the federal agencies. Accordingly, the Act purposely bars the Inspector General from exercising "program operating responsibilities." 5 U.S.C. app. 3 § 9(a)(2). This prohibition ensures the Inspector General will not lose her critical eye towards the agency's own conduct by becoming enmeshed in the agency's routine operations. *See* H.R. REP. NO. 95-584, at 12-13 (1977) (Inspectors General have no responsibility for "audits and investigations constituting an integral part of the programs involved"). As the Justice Department emphasized when opining on this question in 1989 (OLC Opinion, *supra,* at 61):

> The purpose of creating an Inspector General was to have an official in the department who would not have responsibility for the operations of the department and would thus be free to investigate and criticize. If the Inspector General undertakes investigations under the department's regulatory statutes, he could not perform this role.

Within this structure of independence, OIG exercises the specific powers devolved on it by Congress (5 U.S.C. app. 3 § 4(a)):

1) To provide policy direction for and supervise audits and investigations of an agency's "programs and operations";

2) To review legislation, regulations, and proposals and make recommendations

concerning their impact on agency efficiency and on prevention and detection of fraud and abuse;

3) To recommend policies supporting those goals;

4) To conduct inter-governmental relationships to support those goals; and

5) To inform the agency head and Congress on all such matters.

These powers certainly contemplate OIG audits and investigations of non-governmental parties who participate in federal programs, such as health care providers who receive reimbursement from Medicare. Pet. App. 17a. But an Inspector General cannot exercise the agency's ordinary audit functions without compromising her own independence.

II. OIG's PATH Initiative Was a Routine Regulatory Audit

The PATH initiative emerged in 1996 when an OIG audit at a single academic medical center identified two Medicare billing issues: (a) the requirement for supervision of residents by teaching physicians, which for many years was a matter of confusion among Medicare officials and health care providers; and (b) recently-adopted standards for billing physician services for "evaluation and management" of Medicare beneficiaries.[2] Pet. App. 104a. With the result of that first audit in hand, the OIG did *not* employ its statutory powers to recommend further action by the thousands of

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[2] In 1992, Medicare implemented a standardized grid for classifying "evaluation and management" services provided by physicians, Pet. App. 116a, based on the nature of the patient examination, the complexity of medical decision-making, and severity of the problem presented. *See Physician at Teaching Hospitals (PATH) Audits: Hearings Before the Subcomm. of Senate Appropriations Comm.*, 105th Cong. 8 (Oct. 21, 1997) (statement of Michael Mangano, Principal Inspector General, Department of Health and Human Services).

auditors employed by contractors to the Medicare program. Instead, the OIG determined itself "to audit the major teaching hospital or faculty practice plan with each of the nation's 125 medical schools." GENERAL ACCOUNTING OFFICE, MEDICARE: CONCERNS WITH PHYSICIANS AT TEACHING HOSPITALS (PATH) AUDITS, at 12 (July 1998) ("GAO Report"); Julie Marquis, *UC Medical Centers Accused of Fraudulent Insurance Claims*, L.A. TIMES, Aug. 10, 1996, at A21 (Medicare official "said all 125 of the nation's medical centers that operate medical schools will be audited"). The OIG thereby undertook exactly the kind of routine program audit that is beyond its powers.

When asked to explain why it elected this "blanket approach," OIG stated to the General Accounting Office (GAO) that these teaching hospitals "had the greatest number of residents and received the most Medicare revenue." GAO Report, at 12. Notably, OIG did *not* suggest that it had any basis for believing that any targeted institution had either of the identified billing problems, nor did OIG suggest that it was undertaking a sampling of teaching hospitals so it might better gauge the nature of the problem.

Rather, as the Inspector General explained in 1996 correspondence, she elected to launch a "series of nationwide reviews." Pet. App. 104a. By July 1997, PATH reviews were "under way or planned at 49 institutions." GAO Report, at 12. As the GAO pointed out, OIG made no effort "to target institutions most likely in violation of teaching physician billing rules and [to] concentrate its efforts on these institutions." *Id.* at 13.

Both regulators and health care providers had long experienced confusion about the correct standards for teaching physician billing. Indeed, Medicare has described its pre-1995 statements on the subject as "vague," Pet. App. 111a, and "not consistently and clearly articulated . . . over a period of decades." *Id.* at 113a; 60 FED. REG. 63138 (Dec. 8, 1995).

Responding to complaints from AAMC and the American Medical Association, the Secretary of the Department of Health and Human Services asked the general counsel of that agency to set the substantive rules for OIG's PATH audits, which the general counsel did. Pet. App. 105a-117a. As a result of the general counsel's intervention, OIG agreed not to audit any institution whose Medicare contractor had – in OIG's opinion – failed to provide clear guidance on teaching physician billing. Pet. App. 115a.

OIG's "blanket approach" had predictably unfortunate consequences. The GAO Report examined the PATH audit at three institutions, including Dartmouth-Hitchcock Medical Center in New Hampshire. At Dartmouth, the PATH audit consumed ten months of effort before it was abandoned. It identified billing errors totaling $778 – "an amount [OIG] did not deem worthy of collecting" – and cost the institution "$1.7 million in compliance efforts and indirect costs." GAO Report, at 14. This result, the GAO observed diplomatically, "raises questions about the OIG's intent to audit all major teaching hospitals." *Id.* at 4.[3] OIG ultimately reduced the number of PATH audits because of "competing demands for its resources and determinations that some [Medicare contractors] did not provide clear communications regarding teaching physician physical presence rules." *Id.* at 13.

For this case, however, the salient feature of the PATH audits was their character as routine program audits. In a document summarizing the PATH initiative, the OIG wrote

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[3] The GAO's question is not answered by the simple observation that some PATH audits prompted significant repayment settlements. First, because of the threat of penalties authorized by the False Claims Act, those settlement amounts ordinarily doubled the amount of alleged overcharges. *See Thomas Jefferson Enters $12 Million Settlement Over Medicare Charges*, ASSOCIATED PRESS, Aug. 22, 1996. Moreover, the entities under audit felt compelled to settle because False Claims Act penalties "could have been financially devastating" even if liability applied to "relatively few false claims." GAO Report, at 20.

that "[t]he nationwide PATH reviews will focus on compliance with IL 372 [teaching physician billing instructions] and the appropriateness of service codes,"[4] subjects one would expect to see addressed in the course of routine audits. OIG was not investigating institutions it had reason to suspect were engaged in fraud or abuse. OIG was not evaluating the efficacy of Medicare's oversight and enforcement of rules for teaching physician billing. Nor was OIG developing policy recommendations for Congress or the Medicare program. OIG was simply conducting a blanket, routine program audit of physician billing by an entire sector of the health care industry. That is precisely the sort of audit that the Medicare program otherwise conducts every day, and precisely what Congress prohibited with § 9(b) of the Inspector General Act.

The Medicare program contracts with forty-six companies nationwide to perform audits of billing to Medicare by health care providers, and those contractors employ thousands of auditors to perform those tasks. 42 U.S.C. § 1395u(a)(1)(A); 42 C.F.R. § 421.201; *see Medicare Regulatory and Contracting Reform: Hearings Before the Health Subcomm. of House Ways and Means Comm.*, 108th Cong. 7 (Feb. 13, 2003) (testimony of Thomas Scully, Administrator, Centers for Medicare and Medicaid Services). Those regiments of Medicare auditors routinely review the coding and billing of teaching physician services on a post-payment basis, exactly as the OIG did in its PATH initiative. *See* MEDICARE PROGRAM INTEGRITY MANUAL §§ 3.4.4, 4.1 (describing postpayment review by Medicare contractors of coding and coverage issues in physician bills).

The PATH initiative's character as a regulatory audit is reinforced by two additional facts. First, as the GAO found in

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[4] HHS-OIG, PHYSICIANS AT TEACHING HOSPITALS (PATH): SUMMARY OF OIG INITIATIVE (Dec. 4, 1996).

its review, Medicare contractors had performed precisely this form of audit many times in the past. The second institution subjected to a PATH audit, for example, had experienced three such prior audits by a Medicare contractor in the preceding thirteen years. GAO Report, at 16. In fact, the Medicare contractor in Pennsylvania had conducted sixty-seven such prior audits statewide, according to OIG. PHYSICIANS AT TEACHING HOSPITALS (PATH) AUDITS HEARINGS 3.

Second, the substance of OIG's PATH work in no way reflected OIG's special statutory responsibilities, but were routine compliance reviews. OIG never criticized the Medicare program for providing confusing and inconsistent billing standards for teaching physicians, a critique that might be expected from the sort of fearless watchdog over the bureaucracy that the Inspector General Act contemplates. Indeed, OIG abandoned PATH reviews in mid-audit if the institution offered a settlement amount the OIG deemed sufficient, evidently unconcerned with whatever operational insights might be gleaned from a completed audit. GAO Report, at 19.

More disturbing was the OIG's failure to characterize accurately the problems it found. As the 1998 GAO report concluded:

- OIG reported to Congress that it had found several instances when teaching physicians billed for services when they were "on leave or out of town," but GAO was unable to confirm those assertions after reviewing OIG's workpapers. GAO Report, at 21.
- The HHS Inspector General told Congress in 1997 that in the first two PATH reviews the "huge majority" of upcoding errors were related to "multilevel" (more serious) upcoding. The GAO concluded that the Inspector General's claim was

> refuted by her own workpapers: "[T]he workpapers show the overwhelming majority of upcoding errors that were found at the two institutions involved one-level discrepancies. At one of these institutions, not only were few multilevel errors found by the OIG, but one physician accounted for about 70 percent of these." *Id.* at 21-22.

As these examples illustrate, little about the PATH initiative constituted an independent, objective view of government operations or suspected fraud. For its own reasons, OIG seized the opportunity to perform these routine regulatory audits, never casting a skeptical glance at the years of ambiguous government instructions on teaching physician billing that contributed mightily to the problem. *See* Pet. at 24-28.

III. This Court Should Resolve the Conflict Among The Lower Courts Over the Powers of the OIG.

The decision below squarely conflicts with the ruling by the U.S. Court of Appeals for the District of Columbia Circuit in *Truckers United, supra*. In that case, the Inspector General of the Department of Transportation conducted investigations of the possible "falsification" of safety records kept by trucking companies. 251 F.3d at 187. Those regulatory compliance reviews traditionally had been performed by the Office of Motor Carriers of the Federal Highway Administration. The D.C. Circuit found that the Inspector General had "merely lent his search and seizure authority to standard [Office of Motor Carriers] enforcement investigations," which was "beyond his authority" under the Inspector General Act. *Id.* at 189.

The court below attempted to distinguish *Truckers United* on the ground that the PATH initiative involved "fraud and abuse," while the truck-safety audits supposedly involved only "standard" enforcement investigations. Pet. App. 20a-21a. That attempted distinction is exactly backward. By any common understanding of the terms used in Section 4 of the

Inspector General Act, "fraud" and "abuse" plainly include the "falsification" of truck safety records at issue in *Truckers United*. 5 U.S.C. app. 3 § 4(a) (detailing responsibilities of all thirty-one Inspectors General concerning "fraud and abuse"). Equally, the OIG's activities in the PATH audit were entirely "standard," differing in no material way from the billing audits performed daily by the thousands of auditors employed by Medicare's contractors.

The decision below also conflicts with the Fifth Circuit's application of the Inspector General Act in *Burlington Northern, supra,* and *Winters Ranch P'ship v. Viadero*, 123 F.3d 327 (5th Cir. 1997). *Burlington Northern* declared that the Inspector General of the Railroad Retirement Board could not take over the Board's "regularly-scheduled, tax-compliance audits" of employers. If the Inspector General were to assume that function, the court held, his independence would be compromised: "[T]here would be no one, so to speak, to 'watch the watchdog.'" *Burlington Northern*, 983 F.2d at 643.

In *Winters Ranch*, the Fifth Circuit reviewed a plan to "spot check" price support compliance by six wool and mohair producers. 123 F.3d at 335. In contrast to the OIG's conduct of the PATH audits, when the USDA Inspector General found evidence of regulatory violations from those spot checks, "the IG turned this information over to the agency, which promptly conducted its own investigation." *Id.* Thus, the USDA Inspector General was truly evaluating the agency's performance, as well as surveying the compliance of a sample of wool producers, all within its statutory powers.[5]

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[5] *Winters Ranch* suggests in *dicta* that an Inspector General's independence cannot be compromised by performing a regulatory function unless the agency itself "relinquish[es] its own performance of that function." 123 F.3d at 334. That assertion is plainly wrong. An Inspector General's independence will be lost just as surely if she exercises duplicative "program operating responsibilities," as if she exercises program responsibilities that otherwise would be neglected. In both

Like *Burlington Northern*, the PATH audits closely resembled routine regulatory audits. Unlike *Winters Ranch*, the OIG did not merely "spot check" compliance and turn the results over to the agency to address.

The erroneous decision of the Third Circuit will have a disproportionately large impact because the HHS-OIG's office is so large, as is the Medicare program itself. In 2000, Medicare paid over $220 billion a year for health care services, or seventeen percent of all healthcare spending in the country. CENTERS FOR MEDICARE AND MEDICAID SERVICES, PROGRAM INFORMATION ON MEDICARE, MEDICAID, SCHIP AND OTHER PROGRAMS (2002). Respondent herself supervises over 1,500 employees, with a budget of $200 million. U.S. DEPT. OF HEALTH & HUMAN SERVICES, FY 2005 BUDGET IN BRIEF, *available at* http://www.hhs.gov/budget/docbudget.htm. Due to the sheer bulk of those programs, it is a particularly dangerous for the HHS-Inspector General to ignore congressional constraints on its powers, at the cost of its independence. The decision below also may signal to the other thirty Inspectors General that they may sacrifice their independence in pursuit of the short-term goals that may be achieved through routine program audits like the PATH initiative.

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situations, the OIG's independence and objectivity are the casualty of "be[ing] put in a position of operating the very programs they are supposed to oversee." William E. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON IND. L. REV. 97, 108 (1993).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition in this case.

Respectfully submitted,

JOSEPH KEYES, JR
ASSOCIATION OF
AMERICAN MEDICAL
COLLEGES
2450 N Street, NW
Washington, DC 20037
(202) 848-0400

DAVID OVERLOCK STEWART
Counsel of Record
THOMAS M. SUSMAN
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
(202) 508-4600

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